87-1480

No. .....

Supreme Court, U.S.
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CLERK

In The

Supreme Court of the United States

October Term, 1987

—o—

THE WINNEBAGO TRIBE OF NEBRASKA,
a federally recognized Indian Tribe,

Petitioner,

v.

DEPARTMENT OF REVENUE OF
THE STATE OF IOWA,

and

INVESTMENT FINANCE MANAGEMENT CO., INC.,

Respondents.

—o—

**On Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit**

—o—

PETITION FOR WRIT OF CERTIORARI

—o—

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QUESTIONS PRESENTED

1. Did the United States Court of Appeals for the Eighth Circuit err in holding that this action could not be removed from the state court system because it involved the exclusive federal question of whether the State of Iowa may levy a tax upon the Winnebago Tribe of Nebraska's bingo operation and seize in state court proceedings money belonging to the Tribe in satisfaction of the state tax?

2. Did the United States Court of Appeals for the Eighth Circuit err when it ordered this action remanded to a state court having no jurisdiction over the action?

PARTIES TO THE PROCEEDING

The caption contains the names of all parties to the action participating in the United States Court of Appeals for the Eighth Circuit.[1]

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1. The Sloan State Bank, 322 Evans, Sloan, Iowa was a party to the District Court action as garnishee and holder of Petitioner's funds which are the subject of this action. The Sloan State Bank has not participated in this case and apparently claims no interest in the money subject to this action. The Winnebago Tribe of Nebraska is a federally recognized Indian Tribe and Rule 28.1 does not apply to this party.

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In The

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THE WINNEBAGO TRIBE OF NEBRASKA,
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**On Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit**

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinions of the United States District Court for the Northern District of Iowa are unreported. The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 831 F.2d 790 (8th Cir. 1987).

JURISDICTION

The judgment and opinion of the United States Court of Appeals for the Eighth Circuit was made and entered

on October 22, 1987, and a timely petition for rehearing was denied on December 3, 1987. Copies of the opinion, judgment, and order denying rehearing are appended to this petition in the Appendix. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTONAL PROVISIONS AND FEDERAL STATUTES INVOLVED

United States Constitution, Article 1, Section 8, clause 3.

> The Congress shall have Power
>
> To regulate commerce with foreign nations, and among the several states, and with the Indian tribes.

28 U.S.C. § 1441

> § 1441. Actions removable generally
>
> (a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.
>
> (b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title [28 USCS § 1603(a)] may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter [28 USCS § 1446(b)] may be enlarged at any time for cause shown.

(e) The court to which such civil action is removed is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim. (Added by Act of June 19, 1986, P. L. 99-336, § 3(a), 100 Stat. 637.)

28 U.S.C. § 1331

§ 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1362

§ 1362. Indian tribes

The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in con-

troversy arises under the Constitution, laws, or treaties of the United States.

STATEMENT OF THE CASE

The Winnebago Tribe of Nebraska, a federally recognized Indian Tribe, operates a bingo enterprise upon that part of its reservation situated within the State of Iowa. This suit arises from the attempt of the Department of Revenue of the State of Iowa to levy and collect state taxes upon the Tribe's bingo enterprise by garnishee summons against the Tribe's operator and the bank in which the funds of the bingo operation were deposited.

The Iowa Department of Revenue instituted a garnishment action against Investment Finance Management Co., Inc.—the Tribe's then bingo operator[1]—in the District Court for Woodbury County, Iowa to collect a portion of the $243,437.38 in state sales taxes allegedly owed to the state. The garnishee was the Sloan State Bank, which had $53,177.90 on deposit in an account of the Winnebago bingo enterprise. The Winnebago Tribe intervened as owner of the funds, and removed the action to the United States District Court for the Northern District of Iowa under 28 U.S.C. § 1441(b) with original federal question jurisdiction predicated upon 28 U.S.C. §§ 1331 and 1362.

---

1. Investment Finance Management, Co., Inc. has since been terminated by the Winnebago Tribe of Nebraska. This termination is the subject of other litigation not pertinent here.

At the same time, the Tribe moved to dismiss the action on several grounds. Reaching only the Tribe's first contention, the Honorable Donald E. O'Brien, Chief Judge of the federal district court, held in orders dated June 27, 1986 and October 6, 1986 that, although the federal court had original jurisdiction, the Courts of the State of Iowa had none. Further, the Court held that the United States District Court acquired no jurisdiction on removal, since removal jurisdiction is dirivative and, under the statute then in force, was dependent upon the jurisdiction of the state court from which the removal was effectuated. He accordingly dismissed.

On appeal, the United States Court of Appeals for the Eighth Circuit reversed. The Eighth Circuit held that this case fell within the exclusive jurisdiction of the federal courts vis-a-vis the states. That court, however, held that the exclusive nature of the federal question prevented removal in the first instance, and ordered the case remanded to the state court.

———o———

EXISTENCE OF JURISDICTION BELOW

The jurisdiction of the District Court for the Northern District of Iowa over this action is predicated upon 28 U.S.C. §§ 1441, 1331, and 1362. The United States Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291.

———o———

ARGUMENT

The decision below should be reviewed because it erroneously interprets the federal removal statute to preclude immediate federal court determination of vitally important questions of state taxing authority over Indian Tribes and the seizure by the state of Tribal assets. The decision, if allowed to stand, would preclude, even under 28 U.S.C. § 1441(e), the removal to federal court of any action filed in a state court over which the federal courts have exclusive jurisdiction by statute. Further, the decision of the Eighth Circuit would permit unauthorized encroachment by the state into the area of Indian relations, which are committed by the Constitution to the federal government.

Either the decision below is in conflict with *Lambert Run Coal Co. v. Baltimore & Ohio R. Co.*, 258 U.S. 377 (1922), *Avco Corp. v. Aero Lodge I.A.M. & A.W.*, 390 U.S. 557 (1968) and *Caterpillar, Inc. v. Williams*, 55 USLW 4804 (No. 86-526, June 9, 1987) or it erroneously allows state courts to seize the assets of an Indian tribe for taxes purportedly due in conflict with this Court's decisions in *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759 (1985); *California v. Cabazon Band of Mission Indians*, 55 USLW 5225 (No. 85-1708, Feb. 25, 1987) and *McClanahan v. Arizona Tax Commission*, 411 U.S. 164 (1973). Further, the decision below is clearly in conflict with the other circuit courts of appeal which have decided this issue.

1. The Court of Appeals, while recognizing the rule endorsed by this Court in *Lambert Run Coal Co. v. Bal-*

timore & Ohio R. Co., supra, did not follow the rule of that case but stated that "because the only federal question that may be involved is an exclusive federal question, there is no basis for removal." (8th Circuit Opinion—Appendix 4). This decision is inconsistent with *Lambert Run Coal Co. v. Baltimore & Ohio R. Co.,* supra, which held on page 384 that "the circuit court of appeals, in remanding the case to the district court, should have directed a dismissal for want of jurisdiction and without prejudice" because the federal statute required the case to be brought originally in the federal district court. *Id.* at 382. The Eighth Circuit opinion is also inconsistent with the further recognition of the exclusive federal question jurisdiction (or complete pre-emption) doctrine discussed by this Court in *Avco Corp. v. Aero Lodge I.A.M. & A.W.,* supra; and *Caterpillar, Inc. v. Williams,* supra.

The impact of the Eighth Circuit's ruling on this issue goes beyond considerations of state taxation of Indian tribes, and would preclude removal of any cases filed in state courts where exclusive jurisdiction is vested by statute or federal common law in the federal courts. However, this Court in *Franchise Tax Board v. Const. Laborers Vacation Trust,* 463 U.S. 1 (1983) explicitly stated: "precedent involving other statutes granting exclusive jurisdiction to the federal courts suggests that, if such an action were not within the class of cases over which state and federal courts have concurrent jurisdiction, the proper course for a federal district court to take after removal would be to dismiss the case altogether, without reaching the merits." *Id.* at 24 n.27.

The effect of this ruling will not be mitigated by the recent amendment adding subparagraph (e) to 28 U.S.C.

§ 1441 because the Eighth Circuit ruled that the case could not be removed in the first instance—not that it was improperly dismissed after removal. Therefore the effect of this decision is to render 28 U.S.C. § 1441(e) a useless exercise by Congress in those removed cases over which the state court had no jurisdiction because federal authority was plenary and federal court jurisdiction exclusive.

2. Article I Section 8 clause 3 of the United States Constitution vests plenary and exclusive authority over Indian tribes within the Indian Country in Congress. The decision below, in directing remand of this action to the state court, in effect authorizes the states to avoid the Constitutional allocation of authority expressed by this Court's *per se* rule precluding state taxation of Indians within Indian country absent congressional consent in conflict with, among others, the recent decisions of this Court in *Montana v. Blackfeet Tribe of Indians,* supra, and *California v. Cabazon Band of Mission Indians,* supra, by the simple procedural expedient of filing state court actions to seize tribal assets. The remand of this action is further inconsistent with the presumptive jurisdiction of the Tribal Courts and the abstention doctrines explained in *Iowa Mutual Ins. Co. v. LaPlante,* 55 USLW 4170 (No. 85-1589, Feb. 24, 1987). Finally it is difficult for Petitioners to understand, as it was for this Court in *McClanahan v. Arizona Tax Commission,* 411 U.S. 164 (1973), how this remand can be effectuated to a court having neither personal nor subject matter jurisdiction in the face of the due process clause of the Constitution.

3. The holding of the Eighth Circuit here is not only contrary to that Circuit's prior decision in *Koppers*

Co., Inc. v. Continental Casualty Co., 337 F.2d 499 (8th Cir. 1964), but additionally conflicts with the overwhelming weight of authority from the other Circuit Courts of Appeal. Citing authority from this Court, and the Seventh, Eighth, Ninth, and Tenth Circuit Courts of Appeal, the Sixth Circuit, in *Bancohio Corp. v. Fox,* 516 F.2d 29 (6th Cir. 1975) held that it was "perfectly clear that, in areas in which the federal courts have exclusive jurisdiction, a district court to which a case is removed must dismiss the action without prejudice for want of subject matter jurisdiction", *Id.* at 31, and issued a writ of mandamus directed to United States District Judge Fox ordering him to dismiss a case such as this without prejudice.

The Eleventh Circuit, in *Dyer v. Greif Bros, Inc.,* 766 F.2d 398 (11th Cir. 1985) agreed with the overwhelming weight of authority from the other Circuits, and the First Circuit in *Daley v. Town of New Durham,* 733 F.2d 4 (1st Cir. 1984) stated, "although the federal antitrust claims were properly removed, the district court must now dismiss them for lack of jurisdiction", *Id.* at 7, because the claims came within the federal district court's exclusive jurisdiction. *See also, Bradshaw v. G.M.C., Fisher Body Div.,* 805 F.2d 110, 112 (3d Cir. 1986).

Therefore, it is clear that the First, Third, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits, and even prior Eighth Circuit decisions, all hold directly contrary to the holding in this case in compliance with the previous decisions of this Court. The Eighth Circuit decision in this case—particularly since it explicitly found that the federal question upon which removal was predicated was

an exclusive federal question—is so contrary to its own prior decisions, the overwhelming weight of authority from the other United States Circuit Courts of Appeal, and the decisions of this Court, that in the event this Court does not choose to have this case fully briefed and argued, it is suggested that summary reversal of the Eighth Circuit's decision and adoption of the orders of the district court would not be inappropriate.

4. Petitioner submits that state court cases attempting to enforce state taxation of Indian tribes in the Indian Country are subject to removal because of the *per se* federal rule prohibiting such action absent congressional consent, so that the authority of the state to do so under federal law may be addressed directly and immediately by the federal courts without denying the tribal government access to and the use of tribal assets needed for their very survival. The questions presented by this case are of great and recurring significance as Indian tribes attempt to increase their own tax base and prevent dissipation of tribal revenues through state action. The serious questions presented here concerning the ability to generally remove exclusive federal question jurisdiction cases, and, the effect of the remand to the state courts of these claims against a tribe for its activities within Indian Country, if unreversed, upon the ability of the tribal government to finance governmental activities within its jurisdiction, as well as the Constitutional and historical allocation of authority between the federal, tribal, and state governments, make this case a peculiarly appropriate one for the exercise of this Court's discretionary jurisdiction.

———o———

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-2383

Department of Revenue of the State of Iowa,	)	
Appellant,	)	
v.	)	Appeal from the United States District Court for the Northern District of Iowa.
Investment Finance Management Co., Inc. and The Winnebago Tribe of Nebraska, a federally recognized Indian Tribe,	)	
Appellees.	)	

Submitted: May 15, 1987
Filed: October 22, 1987

Before FAGG, Circuit Judge, BRIGHT, Senior Circuit Judge, and WOLLMAN, Circuit Judge.

WOLLMAN, Circuit Judge.

The Iowa Department of Revenue (Department) appeals from the judgment of the district court[1] dismissing

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[1]The Honorable Donald E. O'Brien, Chief Judge, United States District Court for the Northern District of Iowa.

the action for lack of proper subject matter jurisdiction. We reverse and remand with instructions to remand to state court.

The Winnebago Tribe of Nebraska (Tribe) is a federally recognized Indian tribe that exists on reservation lands primarily in Nebraska but also including a small area of land in Iowa near Sloan, Iowa. Since October, 1984, the Tribe has operated "Winn-A-Bingo," a high stakes bingo enterprise on the portion of the reservation lying within the state of Iowa. Winn-A-Bingo is operated by Investment Finance Management Co., Inc. (IFM) under a contract with the Tribe.

The Department sent IFM a tax-due notice in late 1985 in the amount of approximately $240,000, followed in early 1986 by a garnishment of IFM's account in the Sloan State Bank, valued at approximately $53,800. IFM's answer to the garnishment notice in state court alleged that it was not the owner of the garnished funds. The Tribe petitioned to intervene, alleging that it owned the garnished funds, and petitioned to remove the action to the United States District Court for the Northern District of Iowa. The Department asserted no objection to either of these petitions, and the action was removed.

On June 27, 1986, in response to the Tribe's motion, the district court ordered the case dismissed for lack of jurisdiction on the ground that the Iowa state court lacked subject matter jurisdiction. On October 6, 1986, the district court entered an order granting both IFM's motion to amend the judgment, releasing the garnishment, and the Department's motion to stay execution of the judgment pending an appeal.

Prior to June 19, 1986, removal of an action from state court to federal court was conditioned upon the existence of subject matter jurisdiction in the state court. 14A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3721, at 195 (2d ed. 1985) (*Federal Practice and Procedure*) (citing *Lambert Run Coal Co. v. Baltimore & Ohio R.R. Co.*, 258 U.S. 377, 382 (1922) (Brandeis, J.) ("[i]f the state court lacks jurisdiction * * * the federal court acquires none, although it might in a like suit originally brought there have had jurisdiction")). Although this rule was frequently criticized, *see* 14A *Federal Practice and Procedure* § 3721, at 199, and § 3722, at 284, it was expressly endorsed by the Supreme Court as recently as 1983. *See Franchise Tax Bd. v. Constr. Laborers Vacation Trust,* 463 U.S. 1, 24 n.27 (1983) (if a state court lacked jurisdiction, "the proper course for a federal district court to take after removal would be to dismiss the case altogether * * * "). The June 19, 1986, amendment to the federal removal statute, 28 U.S.C. § 1441,[2] is inapplicable because this action was commenced in state court prior to its enactment. *Broadway v. San Antonio Shoe, Inc.*, 643 F. Supp. 584, 585 n.2 (S.D. Tex. 1986); 14A *Federal Practice and Procedure* § 3721, at 9 (Supp. 1987).

Under this old rule, a case falling within the exclusive jurisdiction of the federal courts cannot be removed

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[2]Congress amended the federal removal statute, 28 U.S.C. § 1441, as follows: "The court to which such civil action is removed is *not* precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim." 28 U.S.C. § 1441(e) (1986) (emphasis added).

to the federal courts. 14A *Federal Practice and Procedure* § 3721, at 199. The United States Constitution grants the federal government "exclusive authority over relations with Indian tribes." *Montana v. Blackfeet Tribe of Indians,* 471 U.S. 759, 764 (1985) (citing U.S. Const. art. I, § 8, cl. 3); *Williams v. Lee,* 358 U.S. 217, 220 (1959); *see also* 28 U.S.C. § 1362 (1976). Although there are certain statutory exceptions to this rule, *see* 28 U.S.C. § 1360 (1987); 25 U.S.C. §§ 1321, 1322 (1983), none is applicable here.

Accordingly, because the only basis claimed for removal is a federal question, and because the only federal question that may be involved is an exclusive federal question, there is no basis for removal. However, only if the state court determines that the Tribe owns the account or that this action is in essence an attempt by the State of Iowa to tax a federally recognized Indian tribe must it dismiss. *See Weeks Constr., Inc. v. Oglala Sioux Housing Auth.,* 797 F.2d 668, 672 (8th Cir. 1986) (federal question jurisdiction does not exist merely because an Indian tribe is a party or because the action involves Indian property or contracts).

The judgment is reversed, and the case is remanded to the district court with instructions to remand the action to state court.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

DEPARTMENT OF REVENUE OF THE STATE OF IOWA, Plaintiff, vs. INVESTMENT FINANCE MANAGEMENT CO., INC., Defendant, and THE WINNEBAGO TRIBE OF NEBRASKA, Intervenor, and SLOAN STATE BANK, Garnishee.	NO. C 86-4036 ORDER (Filed June 27, 1986)

The Court has before it the defendant's motion to dismiss. After fully considering the arguments of counsel in their briefs, the Court sustains the motion on the basis that this Court has no derivative jurisdiction because the state court from which this action was removed had no original jurisdiction.

In this action, plaintiff, Department of Revenue of the State of Iowa, petitions for unpaid state tax against

Investment Finance Management Company in the amount of $243,437.38, seeking garnishment against $53,177.90 on deposit at the Sloan State Bank. The Winnebago Tribe of Nebraska has intervened. This action concerns alleged sales taxes due and owing the State for "non-Indian consumer transactions" at the Winn-A-Bingo, the Winnebago Tribe's high stakes bingo enterprise, located at or near Sloan, Iowa which the defendant and intervenor to this action assert is "Indian country" as defined in 18 U.S.C. § 1151.

This action was first instituted in state court and removed by the defendant and intervenor under 28 U.S.C. § 1441, asserting federal question jurisdiction under 28 U.S.C. § 1331, and purportedly under 28 U.S.C. § 1362 providing for jurisdiction of cases *brought* by Indians.[1]

The first prong of the defendant's and intervenor's motion to dismiss contends that this Court lacks jurisdiction of the subject matter because the state court from which it was removed had no jurisdiction. It is only this first contention that the Court reaches at this time. The defendant and intervenor contend that there was no jurisdiction in state court because "Congress alone has the authority to regulate commerce with Indians within the Indian country, U. S. Const., art. 8, cl. 3, and the states have no authority in such matters absent explicit congressional consent, therefore, there is no state court jurisdiction." Congress has, however, granted the states permission in some instances to assume jurisdiction of ac-

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[1]Indians have "brought" no claim of their own. It is unnecessary for the Court, however, to determine whether jurisdiction is appropriate under § 1362 in this order.

tions to which Indians are parties which arise in "Indian country". *See* 25 U.S.C. § 1321, *et seq.*; 28 U.S.C. § 1360. Even if these two jurisdictional sections are to be construed to apply to Indian tribes and other parties in Indian country, these sections do not apply in this case. Title 25, United States Code, Section 1360, gives jurisdiction to state courts in certain cases concerning disputes in Indian country only in the states listed therein. Section 1360 has no application to Iowa because Iowa is not among the listed states. Similarly, § 1321, *et seq.*, does not confer jurisdiction on Iowa state courts to hear this action. Section 1322(a) permits states to assume, with the consent of the tribe occupying the particular Indian country, jurisdiction of certain civil actions involving Indians. The State Department of Revenue points to no provision of the Iowa Code where the State has attempted to assume jurisdiction on the Winnebago Tribe's Indian country near Sloan, Iowa.[2] Given that the actions which are the subject of this complaint occurred in Indian country, and that Investment Finance Management Company is asserted to be an agent of the Winnebago Tribe, and that the Winnebago Tribe of Nebraska is a party to this lawsuit, the state court was without jurisdiction over this action.[3]

It is clear that if the state court lacked jurisdiction, the federal court to which the action is removed cannot

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[2]There is such a law which applies to the Sac and Fox Indian settlement in Tama County, Iowa, Iowa Code § 1.12, but none that applies to the Winnebago Tribe.

[3]"The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the nation's history." *Rice v. Olson*, 324 U.S. 786, 789 (1945), *citing Worcester v. Georgia*, 31 U.S. (6 Pet. 515, [557] (1832).

acquire jurisdiction. In *Lambert Co. v. Balt. & Ohio R. R. Co.*, 258 U.S. 377, 382 (1939), Justice Brandeis stated:

> The jurisdiction of the federal court on removal is, in a limited sense, a derivative jurisdiction. If the state court lacks jurisdiction of the subject-matter or of the parties, the federal court acquires none, although it might in a like suit originally brought there have had jurisdiction.

Stated another way, "removal cannot breath life into a defunct claim." Wright, Miller & Cooper, *Federal Practice and Procedure* Jurisdiction 2d §3721 at 199. While this approach has been criticized, "the Supreme Court has recently made it clear that the rule is still good law." Wright, Miller & Cooper, *supra* at 199-200, *citing, Franchise Tax Bd. v. Laborers Vacation Trust*, 463 U.S. 1 (1983). This Court therefore concludes that because the state court was without jurisdiction, this Court lacks derivative jurisdiction and this case therefore must be dismissed.

The practical effect of this ruling is not to deprive the Department of Revenue of a forum. Indeed, the defendant and intervenor in their brief concede that there would be federal jurisdiction if this case is brought in federal court under the Court's original jurisdiction. In addition to the statutory sections cited by the defendant and the intervenor to establish federal jurisdiction, the Department of Revenue has pointed in its brief to diversity as a source of federal jurisdiction. Thus, no party disputes this Court's original jurisdiction. If the Court were to ignore the derivative jurisdiction rule and the State were to later prevail on its large claim, the State would face a heavy burden before the Court of Appeals,

a fact the State apparently has not considered in resisting the first prong of the motion. This Court would state that this ruling does not go to the merits of plaintiff's claim or the defenses. Based upon the foregoing,

IT IS THEREFORE ORDERED that the motion to dismiss, insofar as it is based on a lack of jurisdiction in state court to support derivative removal jurisdiction, is sustained, and this action is dismissed without prejudice to the refiling of a new action in federal court.

June 27, 1986.

/s/ Donald E. O'Brien
Donald E. O'Brien, Chief Judge
UNITED STATES
DISTRICT COURT

Copies mailed by regular mail w/Judgment on June 27, 1986 to:

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Deputy Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

DEPARTMENT OF REVENUE OF THE STATE OF IOWA,	)	
Plaintiff,	)	C 86-4036
v.	)	Donald E. O'Brien Judge
INVESTMENT FINANCE MANAGEMENT CO., INC.,	)	

JUDGMENT IN A CIVIL CASE

(Filed June 27, 1986)

[ ] Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

[X] Decision by Court. This action came to hearing before the Court with the judge named above presiding. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT the plaintiff, Department of Revenue of the State of Iowa take nothing and the action be dismissed without prejudice. The defendants recover costs from the plaintiff.

WILLIAM J. KANAK
Clerk

/s/ J. Hoch
Deputy Clerk

June 27, 1986

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

DEPARTMENT OF REVENUE OF THE STATE OF IOWA, Plaintiff, vs. INVESTMENT FINANCE MANAGEMENT CO., INC., Defendant, and THE WINNEBAGO TRIBE OF NEBRASKA, Intervenor, and SLOAN STATE BANK, Garnishee.	No. C 86-4036 ORDER (Filed October 6, 1986)

The Court has before it the motion to amend judgment filed by the defendant, Investment Finance Management Company, Inc. (IFM), and the motion for stay of order pending appeal filed by plaintiff, Department of Revenue of the State of Iowa. The Court heard oral argument on these motions. For the reasons stated below, the motion to amend judgment and motion for a stay pending appeal are both granted.

This action was originally brought in state court by the Department of Revenue seeking $243,437.38 in unpaid taxes and seeking garnishment of $53,177.90 on deposit at the Sloan State Bank in an account maintained by IFM.

The case was removed under 28 U.S.C. §1441 to federal court by IFM. The Winnebago Tribe of Nebraska intervened, and the defendant and intervenor moved for dismissal, in part on the basis there was no federal jurisdiction because of the federal court's jurisdiction is derivative and depends on the state court having jurisdiction, and that there was no jurisdiction in state court.[1] This Court sustained the motion to dismiss on this basis, stating that

> [N]o party disputes this Court's original jurisdiction. If the Court were to ignore the derivative jurisdiction rule and the State were to later prevail on its large claim, the State would face a heavy burden before the Court of Appeals, a fact the State apparently has not considered in resisting the first prong of the motion. This Court would state that this ruling does not go to the merits of plaintiff's claim or the defenses.

The motion to amend judgment prays that this Court amend its judgment to specifically state that the garnish-

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[1]This Court notes that § 1441 has been amended to add subsection (e) providing that the court to which a civil action is removed is not precluded from hearing and determining any claim in the action because the state court from which the action was removed did not have jurisdiction over that claim. This amendment is not applicable here because it applies only to civil actions commenced in state court after the date of enactment, June 19, 1986. This case was removed on March 6, 1986; thus it is clear that state proceedings were commenced before the date of enactment.

ment be released because it is void if the action is dismissed. IFM states that the garnishee, the Woodbury County Sheriff's office, and the plaintiff Department of Revenue would not agree to release the garnishment unless the judgment specifically stated that the garnishment is released.

The defendant resists the motion to amend on the basis that if this Court lacks jurisdiction, it cannot order the release of the garnished funds. However, the Court rejects this contention and concludes that the judgment of dismissal makes the garnishment void because there is no pending garnishment action and will so amend the judgment to reflect this.

The Department of Revenue in its motion for stay pending appeal requests that execution of the judgment be stayed. A party seeking a stay pending appeal under Rule 62(d), Fed.R.Civ.P., must show:

(1) that it is likely to succeed on the merits;

(2) that it will suffer irreparable injury unless the stay is granted;

(3) that no substantial harm will come to other interested parties; and

(4) that the stay will do no harm to the public interest.

James River Flood Control Ass'n v. Watt, 680 F.2d 543, 544 (8th Cir. 1982). The Court is persuaded that these factors are satisfied here. The Court is not persuaded that the Department of Revenue will actually prevail on its appeal; however, it has raised a difficult jurisdictional issue, and if the Circuit Court of Appeals adopts it, it

could result in this case being remanded to state court and the garnishment remaining intact.

The Court is persuaded that the Department of Revenue may suffer irreparable harm in that the garnished funds may no longer be available unless a stay of execution of the judgment is granted.

The Court is persuaded that no substantial harm will come to other interested parties. The garnished funds will be in an interest-bearing account pursuant to an agreement described to the Court in post-hearing letters from the parties.

Further the Court can foresee no harm to the public interest.

The Court notes that it has had no opportunity to address the latest contentions concerning jurisdiction raised by the Department of Revenue. In its original brief opposing dismissal, the Department of Revenue stated:

> Intervenor has taken the unusual position of filing on March 6, 1986 both a five page Petition for Removal stating in great detail why this court has jurisdiction and then filing a one page Motion to Dismiss stating this Court lacks jurisdiction. The present case presents the classic case of federal jurisdiction. The Iowa Department of Revenue is the Plaintiff; Investment Finance Management Co., Inc., a Florida corporation is the Defendant; the Intervenor, the Winnebago Tribe of Nebraska, a federally recognized Indian Tribe and the amount in controversy is in excess of $10,000. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1332 and 1362. If the Court finds it lacks jurisdiction the matter should be remanded to the Woodbury County District Court pursuant to 28 U.S.C. § 1447(c).

The issue addressed, however, in the defendant's and intervenor's motion to dismiss was whether the state court had jurisdiction. This issue was not addressed by the Department of Revenue in its brief, but said party simply conceded that the federal court had original jurisdiction. The Department of Revenue has now changed its position and indicated in oral argument on the post-judgment motions and in a post-hearing letter to the Court that the federal court lacks jurisdiction and the state court has jurisdiction. The Department of Revenue, however, has not filed a formal brief on this issue and has not timely moved to reconsider. Thus, having already entered judgment, this Court believes it is unable, on this record, to address the latest contentions made by the Department of Revenue concerning jurisdiction. This Court is therefore constrained to rule as it has, only on those matters properly before it.

IT IS THEREFORE ORDERED that the motion to amend judgment is hereby sustained. Judgment is amended to read:

> IT IS ORDERED AND ADJUDGED that the plaintiff, Department of Revenue of the State of Iowa, take nothing and the action be dismissed without prejudice; the defendant and intervenor recover their costs from the plaintiff; the garnishment be released.

IT IS FURTHER ORDERED that the Clerk enter an amended judgment as set forth above on a separate document.

IT IS FURTHER ORDERED that a stay of execution of this judgment pending a timely appeal is hereby entered.

October 6, 1986.

/s/ Donald E. O'Brien
Donald E. O'Brien, Chief Judge
UNITED STATES
DISTRICT COURT

Copies mailed by regular mail on October 6, 1986 w/Judgment to:

John Waters; Appeals Section; Technical Services Division; Iowa Department of Revenue; PO Box 10457; Des Moines, Iowa 50306

Tom Donohue; Harry M. Griger; Assistant Attorney General; Hoover State Office Building; Des Moines, Iowa 50319

G. William Rice; F. Browning Pipestem; 408 West Main; Suite 100; Norman, Oklahoma 73069

Margaret M. Prahl; PO Box 3086; Sioux City, Iowa 51102 w/B of C

Michael P. Jacobs, 300 Toy National Bank Building; Sioux City, Iowa 51101

/s/ J. Hoch
Deputy Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

DEPARTMENT OF REVENUE OF THE STATE OF IOWA,	)	
	)	C 86-4036
v.	)	
	)	Donald E. O'Brien
INVESTMENT FINANCE MANAGEMENT CO., INC.,	)	Judge

JUDGMENT IN A CIVIL CASE

(Filed October 6, 1986)

[ ] Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

[X] Decision by Court. This action came to hearing before the Court with the judge named above presiding. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

AMENDED JUDGMENT

THAT the plaintiff, Department of Revenue of the States of Iowa, take nothing and the action be dismissed without prejudice; the defendant and intervenor recovered their costs from the plaintiff; the garnishment be released.

WILLIAM J. KANAK
Clerk

/s/ J. Hoch
Deputy Clerk

October 6, 1986

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JUDGMENT

Department of Revenue of the State of Iowa,	)	
	)	No. 86-2383NI
Appellant,	)	
	)	Appeal from the
vs.	)	United States
	)	District Court
Investment Finance Management Co., Inc., et al.,	)	for the Northern
	)	District of Iowa
Appellees.	)	

This appeal from the United States District Court was submitted on the record of the District Court, briefs of the parties and was argued by counsel.

After consideration it is ordered and adjudged that the judgment of the District Court is reversed and the cause is remanded to the District Court for proceedings consistent with the opinion of this court.

October 22, 1987

Appellant will recover from appellees the sum of $125.20 for taxable costs on appeal.

Order entered in accordance with opinion.

/s/ Robert D. St. Vrain
Clerk, U.S. Court of Appeals,
Eighth Circuit.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Department of Revenue of the State of Iowa,	)	
	)	No. 86-2383NI
Appellant,	)	
	)	Appeal from the
vs.	)	United States
	)	District Court
Investment Finance Management Co., Inc., et al.,	)	for the Northern
	)	District of Iowa
Appellees.	)	

Appellee's (Winnebago Tribe) petition for rehearing has been considered by the Court and is denied.

December 3, 1987

Order entered at the Direction of the Court:

/s/ Robert D. St. Vrain
Clerk, U. S. Court of Appeals, Eighth Circuit.